

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TODD ASHKER and DANNY TROXELL,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

No. C 05-03286 CW

ORDER GRANTING, IN
PART, DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT AND DENYING
PLAINTIFFS' CROSS
MOTION FOR SUMMARY
JUDGMENT AND
PLAINTIFFS' MOTION
FOR PRELIMINARY
INJUNCTION

This is a civil rights action under 42 U.S.C. § 1983 seeking damages and injunctive relief filed by pro se Plaintiffs Todd Ashker and Danny Troxell who are housed in the Secured Housing Unit (SHU) at Pelican Bay State Prison (PBSP). Defendants¹ move for summary judgment on Plaintiffs' remaining claims: (1) violation of Plaintiffs' First Amendment right of freedom of speech arising from delayed delivery of their personal mail; (2) violation of Plaintiffs' First Amendment right of freedom of speech arising from Defendants' prohibition of magazines that contain frontal nudity or that promote tattooing; (3) violation of Plaintiffs' due process

¹Under Federal Rule of Civil Procedure 15(d)(1), Francisco Jacquez, in his official capacity as current warden of PBSP, is substituted in place of Joe McGrath, the former warden of PBSP.

1 rights arising from Defendants' Aryan Brotherhood (AB) prison gang
2 validation procedures; (4) violation of Plaintiffs' due process
3 rights arising from a lack of programs available to them because
4 they are housed in the SHU; (5) Mr. Ashker's claim for injunctive
5 relief based on due process violations in his parole suitability
6 determination; and (6) state claims for negligence and an
7 intentional tort. Defendants argue that the federal claims do not
8 rise to the level of constitutional violations and, in the
9 alternative, that they are protected by qualified immunity.
10 Plaintiffs have filed an opposition, have cross-moved for summary
11 judgment and request a preliminary injunction in the event summary
12 judgment is not granted to them on all claims. The matters were
13 taken under submission on the papers. Having read the papers filed
14 by all the parties, the Court GRANTS, in part, Defendants' motion
15 for summary judgment, DENIES Plaintiffs' cross-motion for summary
16 judgment and DENIES Plaintiffs' motion for a preliminary
17 injunction.

18 BACKGROUND

19 I. Delayed Mail

20 On August 6, 2003, Mr. Ashker filed 602 appeal 03-0226
21 alleging that his "incoming mail has been taking longer and longer
22 to be processed by the mail-room." Defs' Request for Judicial
23 Notice (Jud. Not.) Ex. 7. Mr. Ashker alleged that he received two
24 letters eighteen and nineteen days after they were postmarked,
25 respectively. Id. He also alleged that some of his outgoing mail
26 has been delayed or not sent out. Id. This appeal was denied at
27 the three levels of review. Id. The first level denial, which
28 indicated that it was a controlling response for multiple appeals

1 of the same issue, stated that outgoing mail was being processed as
2 the mailbags arrived, but that the mailroom was backlogged eleven
3 days. Id.; Pl's Ex., MM.²

4 In his declaration, Mr. Ashker states that he has been housed
5 at PBSP since 1990 and, during this entire time, the processing of
6 ingoing and outgoing mail has been delayed. Ashker Dec. at 17-19.
7 He states that he rarely receives any personal mail, although he
8 writes to his wife, who lives in England, two or three times each
9 week. Id. ¶ 23.

10 On January 23, 2005, Mr. Troxell filed 602 appeal number 05-
11 0268 alleging that his outgoing mail was delayed for fifteen to
12 twenty-one days. Jud. Not., Ex. 8. Mr. Troxell submitted with his
13 appeal an envelope addressed to the Parole Office in Fresno,
14 California that contained a letter dated December 14, 2004. Id.
15 Mr. Troxell pointed out that the post mark on the envelope was
16 January 6, 2005 which indicated that the letter was not mailed from
17 PBSP until January 5, 2008. Id. He stated that, on December 5,
18 2004, he sent a Christmas card to his friend, who received it on
19 December 26 or 27, a twenty-one or twenty-two day delay. Id.

20 The first level denial, which indicated it was a controlling
21 response for multiple appeals, stated that mail was delayed due to
22 the high volume of mail over the holidays and staff shortages due
23 to illness. The director's level decision explained that "incoming
24 and outgoing mail normally starts to be processed in the mailroom

25
26 ²Mr. Ashker submitted another appeal, number 05-1170, for mail
27 delays. Kirkland Admissions, Ex. NN. This appeal was denied at
28 the third level of review on January 12, 2006, after the complaint
in this case was filed on August 11, 2005. Therefore, appeal
number 05-1170 was unexhausted at the time the complaint was filed
and is not reviewable in this proceeding.

1 within twenty-four hours of receipt but that occasionally, when the
2 volume of mail is high, particularly during the holidays and
3 lockdowns, processing is delayed." Id.

4 In his declaration, Mr. Troxell states that he has been housed
5 at PBSP-SHU since December 27, 1989, and during that time the
6 processing of incoming and outgoing mail has been a problem.
7 Troxell Dec. ¶ 3. He states that he rarely gets personal mail from
8 family and friends. Id. ¶ 9. He states that the mail delays cause
9 a hostile environment between inmates and staff. Id. ¶ 10.

10 Plaintiffs submit copies of seventeen envelopes addressed to
11 them, each of which has a postmark date from the United States post
12 office, a hand-stamped date and a handwritten date. See Defendant
13 Kirkland's Response to Interrogatories, Ex. LL--00. Plaintiffs
14 declare that they wrote the handwritten dates on the envelopes the
15 day they received each piece of mail. The hand-stamped dates are
16 placed on the envelopes by the PBSP mailroom staff after each piece
17 of mail is processed by the mailroom staff. Dec. of Raoul Silva,
18 PBSP Mailroom Supervisor at ¶ 8.³ There is a seventeen to thirty-
19 seven day time lag between the postmark date and the dates the
20 envelopes were received by Plaintiffs.

21 II. Denial of Magazines

22 A. Nudity

23 On April 27, 2004, Mr. Troxell filed 602 appeal 04-01126
24 claiming that the prohibition of magazines with frontal nudity was

25 ³Defendants argue that the hand stamped dates were placed on
26 the envelopes when they were first received at PBSP, before they
27 were processed by the mailroom staff. However, this argument
28 contradicts the declaration of their witness, PBSP Mailroom
Supervisor Silva, who states that the envelopes are stamped after
they are processed.

1 a First Amendment violation and that the magazine "Juxtapoz" should
2 not be prohibited because it contains art related material. Jud.
3 Not., Ex. 9. The denial at the Warden's level indicated that a
4 correctional counselor had reviewed Juxtapoz and noted several
5 pages that portrayed the female breast and nipples and one page
6 portrayed the male penis. The appeal was denied on the ground that
7 it violated title 15 of the California Code of Regulations (CCR)⁴,
8 § 3006(17)(A) and materials containing frontal nudity create a
9 hostile work environment for PBSP staff.

10 In their declarations, Plaintiffs state that Defendants are
11 banning all magazines and books that contain even a single picture
12 of frontal nudity. Ashker Dec. ¶ 28, 30; Troxell Dec. ¶ 14. They
13 state that they have never seen inmates harassing staff with nude
14 photographs nor have they seen inmates fighting over such material.
15 Ashker Dec. ¶ 39; Troxell Dec. ¶ 17. They state that the ban has
16 made the inmates more hostile toward staff. Id. ¶ 22; Ashker Dec.
17 ¶ 44. They state that biker magazines have been banned because of
18 the frontal nudity depicted in them and that they feel disconnected
19 from the biker lifestyle without these magazines. Id. at 46, 49;
20 Troxell Dec. ¶ 22.

21 B. Tattoos

22 On December 28, 2003, Mr. Troxell filed 602 appeal 04-00026
23 and on February 29, 2004 Mr. Ashker filed 602 appeal 04-00527
24 claiming that the prohibition of the tattoo magazines titled
25 "Tattoo Savage," "Tattoo Flash," and "Tattoo," violated the First
26

27 ⁴Unless otherwise noted, all further references to code
28 sections are to title 15 of the California Code of Regulations
(CCR).

1 Amendment and that certain publications are art magazines that
2 should be excepted from the prohibition. Jud. Not., Exs. 5, 6.
3 The appeals were denied on the grounds that the magazines contained
4 pictures of tattoos which could be utilized as templates to
5 replicate tattoo patterns, and articles on how to tattoo and how to
6 make paraphernalia. Id. In their declarations, Plaintiffs state
7 that between 1989 and 2003, they subscribed to tattoo art magazines
8 such as "Tattoo," "Flash," and "Tabu Tattoo," but these were
9 subsequently banned. Plaintiffs state the magazines keep them up-
10 to-date on the tattoo art scene which is a lucrative business about
11 which they want to stay informed, and that the art reference
12 material and artists' profiles are inspirational for their own
13 artistic endeavors. Ashker Dec. at ¶ 61, Troxell Dec. ¶ 34.

14 III. Gang Validation

15 On May 23, 1988, Mr. Ashker was first validated as a member of
16 the AB Prison Gang and he was re-validated on July 13, 1995. Kenny
17 Dec., Ex. A. In July, 2001, Mr. Ashker requested that he be
18 classified as "inactive."⁵ Id. The Institutional Gang
19 Investigator (IGI) examined Mr. Ashker's Central File⁶ and found
20 four documents providing evidence that he was a member of the AB
21 gang and could not be reclassified as inactive. Id. On September
22 3, 2001, Mr. Ashker filed 602 appeal 01-2335 in which he alleged
23 that the inactive review was a sham and that the four documents
24 were false. Jud. Not., Ex. 10. On February 21, 2002, the appeal

25 ⁵An inmate who has been validated or re-validated as an active
26 gang member may apply for an official change in status to inactive.
27 CCR §§ 3378(c) and (d).

28 ⁶The record of an inmate's activities in prison are maintained
in his Central File.

1 was denied at the third level of review on the ground that staff of
2 IGI familiar with the activities of gangs thoroughly reviewed the
3 four confidential memos in Mr. Ashker's file and determined that
4 they constituted sufficient and reliable documentation to support
5 the finding that Mr. Ashker was an active member of the AB prison
6 gang. Id. Mr. Ashker was informed of the IGI's investigation, but
7 refused to participate in interviews with the IGI. Kenny Dec. Ex.
8 A. The IGI sent these findings to the Law Enforcement and
9 Investigations Unit (LEIU) which, citing sixteen independent
10 documents, re-validated Mr. Ashker as a member of the AB on
11 February 19, 2002 and on July 8, 2003. On August 4, 2004, the
12 Institutional Classification Committee (ICI) retained Mr. Ashker in
13 the SHU based on his revalidations. Jud. Not., Ex. 10. On
14 September 15, 2004, Mr. Ashker filed 602 appeal 04-2600 challenging
15 the 2002 and 2003 revalidations and the 2004 decision to retain him
16 in the SHU. On December 17, 2004, the appeal was denied. Jud.
17 Not. Ex. 10. In his declaration, Mr. Ashker avers that he is not,
18 nor has he ever been, a participant in illegal gang activity.
19 Ashker Dec. ¶ 89.

20 Mr. Troxell was initially validated as a member of the AB in
21 1984. Comp. ¶ 104. On January 4, 1988, while he was housed in the
22 SHU at Tehachapi State Prison, Mr. Troxell filed 602 appeal 88-1657
23 alleging that the policy of placing him in the SHU without finding
24 him guilty of disciplinable behavior violated his due process
25 rights. The appeal was denied at the third level of review on
26 April 11, 1988. Jud. Not., Ex. 11; Woodford Responses, Ex. V. Mr.
27 Troxell was re-validated on August 1, 1995 and on July 8, 2003.
28 Kenny Dec, Ex. B. Before the filing of this complaint, he

1 exhausted no other appeals relating to his gang re-validations.

2 VI. Lack of Access to Programs

3 On February 23, 2004, Mr. Ashker filed 602 appeal 04-00566
4 alleging that PBSP denied him access to programs required for
5 parole. Jud. Not., Ex. 13. On July 22, 2004, this appeal was
6 denied at the third level of review on the ground that programs for
7 inmates housed in the SHU must be limited based upon safety and
8 security concerns. Id.

9 V. Denial of Parole

10 The parole hearing at issue is Mr. Ashker's August 7, 2003
11 hearing before the Board of Prison Terms⁷ (Board). The Board
12 concluded that Mr. Ashker was not suitable for parole and would
13 pose a threat to public safety if released based on the following:
14 (1) his lengthy criminal history; (2) the commitment offense of
15 second degree murder; (3) his negative behavior since
16 incarceration; (4) membership in the AB prison gang; (5) failure to
17 participate in self-help and vocational programs; (6) failure to
18 participate in scheduled psychiatric evaluations; (7) lack of
19 either parole plans or a work record; and (8) the opposition of the
20 Sacramento District Attorney's Office and Mr. Ashker's PBSP
21 counselor to a finding of parole suitability.

22 LEGAL STANDARD

23 I. Summary Judgment

24 Summary judgment is properly granted when no genuine and
25 disputed issues of material fact remain, and when, viewing the
26

27 ⁷The Board of Prison Terms was abolished effective July 1,
28 2005, and replaced with the Board of Parole Hearings. Cal. Penal
Code § 5075(a).

1 evidence most favorably to the non-moving party, the movant is
2 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
3 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
4 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
5 1987).

6 The moving party bears the burden of showing that there is no
7 material factual dispute. Therefore, the court must regard as true
8 the opposing party's evidence, if supported by affidavits or other
9 evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815
10 F.2d at 1289. The court must draw all reasonable inferences in
11 favor of the party against whom summary judgment is sought.
12 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
13 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d
14 1551, 1558 (9th Cir. 1991).

15 Material facts which would preclude entry of summary judgment
16 are those which, under applicable substantive law, may affect the
17 outcome of the case. The substantive law will identify which facts
18 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
19 (1986).

20 Where the moving party does not bear the burden of proof on an
21 issue at trial, the moving party may discharge its burden of
22 production by either of two methods. Nissan Fire & Marine Ins.
23 Co., Ltd., v. Fritz Cos., Inc., 210 F.3d 1099, 1106 (9th Cir.
24 2000).

25 The moving party may produce evidence negating an
26 essential element of the nonmoving party's case, or,
27 after suitable discovery, the moving party may show that
28 the nonmoving party does not have enough evidence of an
essential element of its claim or defense to carry its
ultimate burden of persuasion at trial.

1 Id.

2 If the moving party discharges its burden by showing an
3 absence of evidence to support an essential element of a claim or
4 defense, it is not required to produce evidence showing the absence
5 of a material fact on such issues, or to support its motion with
6 evidence negating the non-moving party's claim. Id.; see also
7 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990); Bhan v.
8 NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If the
9 moving party shows an absence of evidence to support the non-moving
10 party's case, the burden then shifts to the non-moving party to
11 produce "specific evidence, through affidavits or admissible
12 discovery material, to show that the dispute exists." Bhan, 929
13 F.2d at 1409.

14 If the moving party discharges its burden by negating an
15 essential element of the non-moving party's claim or defense, it
16 must produce affirmative evidence of such negation. Nissan, 210
17 F.3d at 1105. If the moving party produces such evidence, the
18 burden then shifts to the non-moving party to produce specific
19 evidence to show that a dispute of material fact exists. Id.

20 If the moving party does not meet its initial burden of
21 production by either method, the non-moving party is under no
22 obligation to offer any evidence in support of its opposition. Id.
23 This is true even though the non-moving party bears the ultimate
24 burden of persuasion at trial. Id. at 1107.

25 Where the moving party bears the burden of proof on an issue
26 at trial, it must, in order to discharge its burden of showing that
27 no genuine issue of material fact remains, make a prima facie
28 showing in support of its position on that issue. UA Local 343 v.

1 Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1471 (9th Cir. 1994). That
2 is, the moving party must present evidence that, if uncontroverted
3 at trial, would entitle it to prevail on that issue. Id. Once it
4 has done so, the non-moving party must set forth specific facts
5 controverting the moving party's prima facie case. UA Local 343,
6 48 F.3d at 1471. The non-moving party's "burden of contradicting
7 [the moving party's] evidence is not negligible." Id.

8 II. Section 1983

9 Title 42 U.S.C. § 1983 "provides a cause of action for the
10 'deprivation of any rights, privileges, or immunities secured by
11 the Constitution and laws' of the United States." Wilder v.
12 Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C.
13 § 1983). Section 1983 is not itself a source of substantive
14 rights, but merely provides a method for vindicating federal rights
15 elsewhere conferred. Graham v. Connor, 490 U.S. 386, 393-94
16 (1989). In order to state a claim under § 1983, Plaintiffs must
17 allege two elements: (1) the violation of a right secured by the
18 Constitution or laws of the United States, and (2) the alleged
19 violation was committed by a person acting under the color of state
20 law. West v. Atkins, 487 U.S. 42, 48 (1988).

21 An individual defendant is liable for money damages under
22 § 1983 only if the defendant personally participated in or
23 otherwise proximately caused the unconstitutional deprivations of
24 which the plaintiff complains. Leer v. Murphy, 844 F.2d 628, 634
25 (9th Cir. 1988). To establish individual liability, a plaintiff
26 must allege one of the following: (1) the defendant personally
27 participated in or ordered the constitutional violation; (2) the
28 defendant, acting in a supervisory capacity, failed to train

1 properly or supervise personnel, resulting in the violation;
2 (3) the defendant was responsible for an official policy or custom
3 which caused the violation; or (4) the defendant knew of the
4 violation and failed to prevent it. Taylor v. List, 880 F.2d 1040,
5 1045 (9th Cir. 1989); Ybarra v. Reno Thunderbird Mobile Home, 723
6 F.2d 675, 680 (9th Cir. 1984).

7 Officials of the state while acting in their official
8 capacities, are not "persons" within the meaning of § 1983. Will
9 v. Michigan Dep't of State Police, 491 U.S. 58, 64 (1989). The
10 distinction derives from the Eleventh Amendment. Id. at 66-67;
11 Kentucky v. Graham, 473 U.S. 159, 165-168 (1985). The Eleventh
12 Amendment bars suits in federal court for damages and retrospective
13 injunctive relief against state officials, acting in their official
14 capacity, unless the defendant has waived immunity or Congress has
15 exercised its Fourteenth Amendment power to override immunity.
16 Will, 491 U.S. at 66. In enacting 42 U.S.C. § 1983, Congress did
17 not intend to eliminate Eleventh Amendment immunity. Id. The
18 Eleventh Amendment also bars pendent state law claims against state
19 officials in federal court. Pennhurst State Schl. & Hosp. v.
20 Halderman, 465 U.S. 89, 106, 121 (1984). Neither a state nor its
21 officials acting in their official capacities therefore may be sued
22 under § 1983 for damages or retrospective injunctive relief. Will,
23 491 U.S. at 71.

24 However, a state official in his official capacity is
25 considered a "person" for § 1983 purposes when sued for prospective
26 injunctive relief. Id. at n.10. In what has become known as the
27 Ex Parte Young doctrine, a suit for prospective injunctive relief
28 provides a narrow exception to Eleventh Amendment immunity. Ex

1 Parte Young, 209 U.S. 123 (1908); Doe v. Lawrence Livermore Nat'l
2 Lab., 131 F. 3d 836, 839 (9th Cir. 1997).

3 EVIDENTIARY OBJECTIONS

4 Defendants object to some of the evidence submitted by
5 Plaintiffs. The Court has reviewed these evidentiary objections
6 and has not relied on any inadmissible evidence. The Court will
7 not discuss each objection individually. To the extent that the
8 Court has relied on evidence to which Defendants have objected,
9 such evidence has been found admissible and the objections are
10 overruled.

11 DISCUSSION

12 I. First Amendment Claim Based on Mail Delays

13 Defendants argue that Mr. Ashker's claim based on mail delays
14 is precluded because he did not state such a claim in his
15 complaint. Mr. Ashker responds that this was an oversight and
16 requests that he be allowed to state this claim. The Court will
17 allow Mr. Ashker's claim.

18 Plaintiffs claim that PBSP has an ongoing problem with
19 processing personal mail in a timely manner and that this has been
20 harmful to inmates and their relationships with family and friends.
21 Defendants argue that a temporary delay in the delivery of mail,
22 resulting from security inspections, does not violate the First
23 Amendment. Defendants also argue that, even if there was a
24 constitutional violation, they are protected from suit by qualified
25 immunity.

26 Prisoners enjoy a First Amendment right to send and receive
27 mail. Witherow v. Paff, 52 F.3d 264, 265 (9th Cir. 1995) (citing
28 Thornburgh v. Abbott, 490 U.S. 401, 407 (1989)). A prison,

1 however, may adopt regulations or practices which impinge on a
2 prisoner's First Amendment rights as long as the regulations are
3 "reasonably related to legitimate penological interests." Turner
4 v. Safley, 482 U.S. 78, 89 (1987). The Turner standard applies to
5 regulations and practices concerning all correspondence between
6 prisoners and to regulations concerning incoming mail received by
7 prisoners from non-prisoners. Thornburgh, 490 U.S. at 413. In the
8 case of outgoing correspondence from prisoners to non-prisoners,
9 however, an exception to the Turner standard applies. Because
10 outgoing correspondence from prisoners does not, by its very
11 nature, pose a serious threat to internal prison order and
12 security, there must be a closer fit between any regulation or
13 practice affecting such correspondence and the purpose it purports
14 to serve. Id. at 411-12.

15 Prison officials have a responsibility to forward mail to
16 inmates promptly. Bryan v. Werner, 516 F.2d 233, 238 (3d Cir.
17 1975). Allegations that mail delivery was delayed for an
18 inordinate amount of time are sufficient to state a claim for
19 violation of the First Amendment. Antonelli v. Sheahan, 81 F.3d
20 1422, 1432 (7th Cir. 1996). A temporary delay or isolated incident
21 of delay does not violate a prisoner's First Amendment rights.
22 Crofton v. Roe, 170 F.3d 957, 961 (9th Cir. 1999) (policy of
23 diverting publications through property room reasonably related to
24 prison's interest in inspecting mail for contraband).

25 CCR §§ 3120-3146 govern the receipt, processing and delivery
26 of inmate mail. First class mail shall be delivered to the inmate
27 as soon as possible, but not later than seven calendar days from
28 receipt of the mail at the facility mailroom. CCR § 3133(a)(1).

1 All non-confidential mail addressed to an inmate will be opened and
2 inspected before delivery to the inmate and all non-confidential
3 mail, whether incoming or outgoing, is subject to being read in its
4 entirety by designated staff. CCR § 3133(b)(3).

5 Raoul Silva, a PBSP employee who has been a mail room
6 supervisor since January 7, 2008, submits a declaration detailing
7 the procedures used to process the mail at PBSP. PBSP receives
8 several thousand items of incoming mail each day. First, mail is
9 divided into the categories of personal and legal mail. Legal mail
10 is not opened, except in limited circumstances set forth in the
11 regulations. Personal mail is sorted into bins, with a separate
12 bin for each housing unit. Mail room workers sort through the
13 bins, opening each non-legal letter or package to ensure that there
14 is no contraband and that stamps, money orders and pictures are
15 properly processed. Each piece of mail is then stamped and placed
16 in a delivery bag that corresponds to the housing unit of the
17 addressee. Correctional officers in each housing unit review the
18 incoming mail to ensure that it does not contain illegal
19 communications. Near holidays such as Christmas, Valentine's Day,
20 Easter and Father's Day, the mail room must process approximately
21 three times the amount of mail received on non-holidays and this
22 causes processing delays.

23 In regard to outgoing mail, Defendants are correct that the
24 evidence consists of Mr. Troxell's January 23, 2005 602 appeal in
25 which he complains about two pieces of mail that were delayed.
26 Because this appeal pertains to only two incidents of delayed
27 outgoing mail at the time of the Christmas holidays, it does not
28 rise to the level of a constitutional violation. See Crofton, 170

1 F.3d at 961 (isolated incident of mail delay does not violate First
2 Amendment).

3 In regard to incoming mail, the evidence consists of
4 Plaintiffs' two appeals and the envelopes submitted to show ongoing
5 delays. There are seventeen envelopes postmarked from July 17,
6 2003 to May 2, 2005, none sent around the holidays, that were
7 received by Plaintiffs from seventeen to thirty-seven days after
8 the date of the postmark. Although Defendants argue there are only
9 a few pieces of mail that Plaintiffs received late, Plaintiffs'
10 evidence is sufficient to raise a material dispute of fact
11 regarding whether Defendants violated Plaintiffs' First Amendment
12 rights by delaying mail delivery for an inordinate period of time.
13 However, Plaintiffs' evidence is not sufficient to justify summary
14 judgment in their favor either.

15 Plaintiffs seek injunctive relief on this claim. In their
16 complaint, Plaintiffs do not specify the type of injunctive relief
17 they seek. The Court assumes they seek an injunction directing
18 Defendants to deliver their mail promptly. For injunctive relief
19 purposes, Plaintiffs need only name a defendant who, in his
20 official capacity, has responsibility for the mail procedures at
21 PBSP. Francisco Jacquez, in his official capacity as warden of
22 PBSP, is an appropriate Defendant because he has authority over the
23 mail procedures at PBSP. Therefore, this claim may proceed as to
24 Warden Jacquez.

25 However, as a request for damages, this claim must be denied
26 because Plaintiffs' evidence fails to tie any particular Defendant
27 to the act of delivering mail late. As stated above, § 1983 claims
28 for damages require proof that a particular defendant participated

1 in or directly ordered the constitutional violation. Summary
2 judgment is granted on this claim to all Defendants other than
3 Warden Jacquez. Further, even if Plaintiffs had proof of the
4 participation of the other Defendants, they would be protected from
5 liability for damages by qualified immunity.

6 A. Qualified Immunity

7 The defense of qualified immunity protects "government
8 officials . . . from liability for civil damages insofar as their
9 conduct does not violate clearly established statutory or
10 constitutional rights of which a reasonable person would have
11 known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The
12 threshold question is whether, if all factual disputes were
13 resolved in favor of the party asserting the injury, the evidence
14 would show the defendant's conduct violated a constitutional right.
15 Saucier v. Katz, 533 U.S. 194, 201 (2001). "If no constitutional
16 right would have been violated were the allegations established,
17 there is no necessity for further inquiries concerning qualified
18 immunity." Id. On the other hand, if a violation could be made
19 out on the allegations, the next step is to ask whether the
20 constitutional right in issue was clearly established. Id. The
21 question here is whether it would be clear to a reasonable officer
22 that his conduct was unlawful in the situation he confronted. Id.
23 If the law did not put the officer on notice that his conduct would
24 be clearly unlawful, summary judgment based on qualified immunity
25 is appropriate. Id.

26 In Pearson v. Callahan, __ S.Ct. __, 2009 WL 128768, * 9
27 (U.S. Jan. 21, 2009), the Supreme Court overruled Saucier's
28 requirement that the court must determine first whether there was a

1 constitutional deprivation and then whether such right was clearly
2 established. Under Pearson, the court may exercise its discretion
3 in deciding which prong to address first, in light of the
4 particular circumstances of each case. Id. (noting that though the
5 Saucier sequence is often appropriate and most efficient, it is no
6 longer mandatory).

7 The Court concludes that, even if ongoing delays of the
8 delivery of incoming mail violated Plaintiffs' First Amendment
9 rights, qualified immunity applies because the law was not clearly
10 established at the time of the conduct at issue and Defendants'
11 conduct was objectively reasonable. Thornburgh v. Abbott is the
12 only Supreme Court case to discuss the First Amendment rights of
13 prisoners to receive incoming mail. In Thornburgh, the Court
14 examined regulations governing the censorship and distribution of
15 prisoners' incoming publications. The Court found the regulations
16 at issue were facially constitutional because they met the Turner
17 v. Safely test and were reasonably related to legitimate
18 penological interests. Thornburgh, 490 U.S. at 419.

19 Here, Plaintiffs are not complaining that the regulations at
20 issue are unconstitutional. They agree that PBSP has a legitimate
21 penological interest in screening their incoming mail. Their
22 complaint is that PBSP mail screening procedure takes too long and
23 PBSP does not hire enough staff to process the mail efficiently.
24 The only Ninth Circuit case cited by Plaintiffs is Morrison v.
25 Hall, 261 F.3d 896, 905 (9th Cir. 2001), which held that Oregon
26 state prison regulations prohibiting bulk rate, third and fourth
27 class mail did not meet the Turner factors and was unconstitutional
28 as applied to pre-paid, for-profit, subscription publications.

1 This case does not establish how promptly or efficiently mail must
2 be delivered to inmates. Plaintiffs also cite a Third Circuit
3 case, Bryan v. Werner, 516 F.2d 233, 238 (3rd Cir. 1975), which
4 stated, in dicta, that prison officials have a responsibility to
5 deliver mail from the courts promptly to inmates. This out-of-
6 circuit case, which focuses on legal mail, does not create clearly
7 established law in the Ninth Circuit as to how promptly personal
8 mail must be delivered. In Antonelli, 81 F.3d at 1432, the Seventh
9 Circuit held that the allegation that mail delivery was being
10 delayed for an inordinate amount of time and sometimes mail was
11 stolen was sufficient to withstand a motion to dismiss for failure
12 to state a claim. However, this Seventh Circuit case likewise does
13 not create clearly established law in the Ninth Circuit as to how
14 promptly mail must be delivered.

15 Therefore, Defendants are qualifiedly immune from suit for
16 damages on this claim.

17 II. First Amendment Claim Based on Withheld Magazines

18 Plaintiffs bring a facial and an as-applied First Amendment
19 challenge to the regulations which ban magazines that contain
20 frontal nudity and tattoo art. They also claim the ban on
21 magazines containing frontal nudity violates California Penal Code
22 § 2602(c).

23 Regulations limiting prisoners' access to publications or
24 other information are valid only if they are reasonably related to
25 legitimate penological interests. Thornburgh, 490 U.S. at 413
26 (citing Turner, 482 U.S. at 89). Considerable deference is given
27 to the determination of prison administrators who, in the interest
28 of security, regulate the relations of prisoners with the outside

1 world. Id. at 408. There are four factors to consider when
2 determining whether a regulation is reasonably related to
3 legitimate penological interests: (1) whether there is a "valid,
4 rational connection between the prison regulation and the
5 legitimate governmental interest put forward to justify it"; (2)
6 "whether there are alternative means of exercising the right that
7 remain open to prison inmates"; (3) "the impact accommodation of
8 the asserted constitutional right will have on guards and other
9 inmates and on the allocation of prison resources generally"; and
10 (4) the "absence of ready alternatives", or, in other words,
11 whether the rule at issue is an "exaggerated response to prison
12 concerns." Turner, 482 U.S. at 89-90.

13 A. Nudity

14 The California Code of Regulations provides that inmates may
15 not possess obscene materials. CCR § 3006. In 2002, this
16 regulation was amended to add subsection (c)(17) which provides
17 that inmates may not possess "sexually explicit images that depict
18 frontal nudity in the form of personal photographs, drawings,
19 magazines, or other pictorial format." CCR § 3006(c)(17).
20 Sexually explicit material is defined as "material that shows the
21 frontal nudity of either gender, including the exposed female
22 breast(s) and/or genitals of either gender." CCR § 3006(c)(17)A).
23 There is an exception for educational, medical, scientific or
24 artistic materials approved by the head of the institution or his
25 or her designee on a case-by-case basis. CCR § 3006(c)(17)(B).
26 PBSP Operating Procedure (OP) 205, dated August, 2005, lists
27 magazines that are permanently excluded, including the magazine
28 "Juxtapoz," which is at issue here.

1 1. Facial Challenge to Regulation

2 Defendants argue CCR § 3006(c)(17) is constitutional because,
3 under Turner, it is reasonably related to legitimate penological
4 interests. In support of their argument, Defendants rely on Mauro
5 v. Arpaio, 188 F.3d 1054, 1059-63 (9th Cir. 1999) (en banc), in
6 which the court found that a jail policy banning materials
7 depicting frontal nudity passed constitutional muster because it
8 met all four prongs of the Turner test. Additionally, Defendants
9 rely on Nelson v. Woodford, 2006 WL 571359, at *3-5 (N.D. Cal. Mar.
10 2, 2006), in which the district court applied Mauro to find that
11 CCR § 3006(c)(17) is constitutional because it is reasonably
12 related to legitimate penological interests. On appeal, the Ninth
13 Circuit affirmed the district court's ruling in Nelson, holding:
14 "The district court properly concluded that the regulations
15 prohibiting Nelson's possession of obscene or sexually explicit
16 material, 15 Cal. Code Reg. §§ 3006(c)(15) & (17), respectively,
17 are constitutional because the regulations' underlying policies are
18 reasonably related to legitimate penological interests." Nelson v.
19 Woodford, 249 Fed. Appx. 529, 530 (9th Cir. 2007).

20 Plaintiffs contend Mauro is inapposite because it was a county
21 jail case where the average stay was fourteen days, as opposed to
22 Plaintiffs' life sentences. Mauro is directly relevant to the
23 instant case. Although Mauro arose in a county jail, other courts
24 in this district have applied its reasoning to CCR § 3006(c)(17) in
25 cases brought by inmates incarcerated at PBSP. See Nelson, 2006 WL
26 571359, at *4; Self v. Horel, 2008 WL 5048392, at *1 (N.D. Cal.
27 Nov. 24, 2008) (plaintiff housed in PBSP SHU).

28 Plaintiffs also argue that Defendants have failed to produce

1 evidence of sexual harassment of PBSP staff caused by publications
2 portraying frontal nudity. However, under the Turner test,
3 Defendants need not show specific instances of incidents that
4 occurred as a result of the challenged policy. Casey v. Lewis, 4
5 F.3d 1516, 1521 (9th Cir. 1993). It is sufficient that a prison
6 regulation is justified on the basis of anticipated security
7 problems. Id.

8 Therefore, CCR § 3006(c)(17) is facially constitutional.

9 2. As-Applied Challenge to Regulation

10 Plaintiffs argue that § 3006(c)(17) is unconstitutional as
11 applied to them because Juxtapoz is an artistic magazine which
12 includes some incidental nudity relating to art subjects and should
13 be allowed under the artistic exception. Defendants determined
14 that Juxtapoz did not meet the artistic exception because the
15 frontal nudity it displayed created a hostile work environment for
16 staff. See Kirkland Admissions, Ex. LL.

17 Prison officials have broad discretion to determine what
18 publications may enter a prison. Thornburgh, 490 U.S. at 416.
19 Regulations that provide for individualized determinations as
20 opposed to predetermined categorical exclusions strike an
21 acceptable balance between the prison's legitimate governmental
22 objectives and prisoners' First Amendment rights. Id. at 416-17 &
23 n. 15. CCR § 3006(c)(17) provides for individualized
24 determinations as to what sexually explicit materials inmates may
25 possess. Even if, as Plaintiffs argue, Juxtapoz has artistic
26 value, it was neither arbitrary nor irrational for Defendants to
27 deny Plaintiffs access to the publication. Although CCR
28 § 3006(c)(17)(B)(2) allows inmates to possess some sexually

1 explicit materials, it does not require that inmates be allowed to
2 possess sexually explicit material solely because they believe it
3 has artistic value. Defendants' decision did not deprive
4 Plaintiffs of the right to possess either educational art materials
5 that meet the requirements of CCR § 3006(c)(17)(B)(2).

6 Mr. Troxell argues that magazines like Juxtapoz are invaluable
7 to him because he used them as art reference material for his art
8 work and that all adult fantasy art, which is the kind he does,
9 portrays some partial nudity. Plaintiffs also explain that,
10 previous to their incarceration, they were part of the biker
11 culture and lament their loss of connection to this lifestyle
12 because certain biker lifestyle magazines have been banned on the
13 ground that they contain frontal nudity.

14 Plaintiffs have no constitutional right to this connection.
15 As stated above, Mr. Troxell has access to other educational or art
16 materials that do not contain frontal nudity or that meet the
17 requirements of CCR § 3006(c)(17)(B)(2) and Plaintiffs have access
18 to any biker lifestyle magazines that do not display frontal
19 nudity. Therefore, Defendants' determination to ban Juxtapoz was a
20 constitutional application of 3006(c)(17).

21 3. Violation of California Penal Code § 2601

22 Plaintiffs contend that CCR § 2006(c)(17) violates California
23 Penal Code § 2601(c)(1) because the legislative history of § 2601
24 establishes that the legislature declined to include a ban on
25 frontal nudity. Defendants argue that this claim is waived because
26 Plaintiffs did not include it in their complaint. Plaintiffs
27 correctly point out that they referred to § 2601 in ¶ 233 of their
28 First Amended Complaint. However, this claim is foreclosed by Snow

1 v. Woodford, 128 Cal. App. 4th 383, 394 (2005), which held that CCR
2 § 2006 was enacted to prevent conditions which tend to incite riot
3 or violence and, thus, does not violate Penal Code § 2601.

4 B. Tattoo Publications

5 California regulations provide that inmates shall not tattoo
6 themselves or others, and shall not permit tattoos to be placed on
7 themselves. CCR § 3063. Tattooing or the possession of tattoo
8 paraphernalia is a serious rule violation. CCR § 3315. A serious
9 rule violation is defined as a violation of the law. CCR
10 § 3312(a)(3). Based on these regulations, magazines whose primary
11 purpose is to encourage tattooing are prohibited at PBSP. Silva
12 Dec. ¶ 14. The magazines "Savage Tattoo," "Tattoo," and "Flash
13 Tattoo," at issue here, are on the list of banned publications.
14 Jud. Not., Exs. 3, 4.

15 Defendants denied Mr. Ashker's 602 appeal for the following
16 reasons: (1) tattooing is recognized as a means for transmitting
17 serious diseases such as AIDS and hepatitis between inmates;
18 (2) the primary function of the tattoo magazines at issue is to
19 promote tattooing, they often contain articles on how to tattoo or
20 how to make tattoo paraphernalia, and they are used for tattoo
21 patterns; and (3) other forms of media, such as newspapers, could
22 be used to keep current on tattoo art. Jud. Not., Exs. 5 and 6.
23 Defendants also argue that tattoos can be used for gang
24 identification, which promotes gang violence and threatens the
25 security of PBSP.

26 The four factor Turner test applies to determine if the
27 regulation prohibiting tattoo magazines violates Plaintiffs' First
28 Amendment rights. The first Turner factor is met because the

1 regulation promotes penological interests in maintaining the
2 health, safety and security of the prison, its inmates and its
3 employees. Furthermore, it is neutral in that it prohibits all
4 publications that promote tattooing without regard for the content
5 of the tattoos.

6 The second Turner factor is met because inmates have access to
7 other artistic books and magazines and can read about tattooing in
8 newspapers and other periodicals.

9 The third Turner factor is met because the regulation protects
10 the interests and security of guards and inmates, which outweighs
11 the restriction on Plaintiffs' rights. The fourth Turner factor is
12 met because Plaintiffs, who have the burden of putting forth
13 alternatives to the regulation, have failed to do so.

14 Plaintiffs argue that they received the magazines at issue for
15 over twenty years before PBSP banned them in 2003 and that the
16 content is about benign subjects such as artist profiles, lifestyle
17 and philosophies, history, music and fashion. However, they do not
18 dispute that the magazines' purpose is to promote tattooing and to
19 describe the methods for tattooing. Therefore, this argument is
20 unpersuasive.

21 Plaintiffs submit declarations of two inmates who were
22 previously housed in the SHU at Corcoran State Prison (Corcoran)
23 who state that tattoo magazines were not banned in the SHU at
24 Corcoran. (Docket ## 293 and 294). Citing Griffin v. Lombardi,
25 946 F.2d 604, 607-08 (8th Cir. 1991), Plaintiffs argue that these
26 declarations raise a factual dispute as to the legitimacy of PBSB's
27 ban. Griffen is distinguishable. In Griffen, the declarations
28 that raised a factual dispute were from prisoners who had received

1 original diplomas and transcripts at other institutions and were
2 allowed to retain them when they were transferred to the prison
3 where the plaintiffs were incarcerated. Here, Plaintiffs submit
4 only two declarations from inmates formerly housed in the SHU at
5 Corcoran, which may not have had the same characteristics as the
6 SHU at PBSP.

7 In Brown v. Peyton, 437 F.2d 1228, 1232 (4th Cir. 1971),
8 another case cited by Plaintiffs, the court indicated that
9 distribution of the religious magazine in question had increased at
10 other prisons and that the experience of those institutions would
11 be probative of the question of the state interests in forbidding
12 the publication. Here, the publication at issue is not a religious
13 magazine and there is no evidence that its distribution is
14 increasing at other penal institutions.

15 Furthermore, both Griffin and Brown are out-of-circuit
16 decisions that are not binding on this Court; Plaintiffs have not
17 cited any Ninth Circuit authority on this issue.

18 Therefore, the regulations at issue are constitutional on
19 their face and as applied to Plaintiffs.

20 Even if there were a constitutional violation, the doctrine of
21 qualified immunity would apply to any damages claim. As noted,
22 Plaintiffs have not submitted relevant Ninth Circuit or Supreme
23 Court authority on this claim. Thus the law is not clearly
24 established and Defendants could not have understood their actions
25 would violate Plaintiffs' rights.

26 Accordingly, summary judgment is granted in favor of
27 Defendants on this claim and Plaintiffs' cross-motion for summary
28 judgment is denied.

1 III. Gang Validation Procedures and Placement in SHU

2 A. Due Process Legal Standard

3 California's policy of housing suspected gang members in the
4 SHU is not a disciplinary measure, but an administrative strategy
5 to preserve order in the prison and protect the safety of all
6 inmates. Bruce v. Ylst, 351 F.3d 1283, 1287 (9th Cir. 2003).
7 However, California statutes and prison regulations create a
8 liberty interest in freedom from administrative segregation.
9 Toussaint v. McCarthy, 801 F.2d 1080, 1098, 1100 (9th Cir. 1986).⁸
10 In Wilkinson v. Austin, 545 U.S. 209, 223-25 (2005), the Supreme
11 Court held that indefinite placement in Ohio's "supermax" facility,
12 where inmates are not eligible for parole consideration, imposes an
13 "atypical and significant hardship within the correctional
14 context." Based on Wilkinson, because indefinite placement in
15 California's SHU may render inmates ineligible for parole
16 consideration, California prisoners may have a liberty interest in
17 not being placed indefinitely in the SHU.

18 When prison officials initially determine whether a prisoner
19 is to be segregated for administrative reasons, due process
20 requires that they comply with the following procedures: (1) they
21 must hold an informal non-adversary hearing within a reasonable
22 time after the prisoner is segregated, (2) the prisoner must be
23 informed of the charges against him or the reasons segregation is

24 ⁸CCR § 3335(a) permits placement in administrative segregation where
25 the presence of an inmate in the general population poses a threat to
26 his own safety and/or to an ongoing investigation of serious
27 misconduct or criminal activity. CCR § 3339(a) provides that release
28 from segregation shall occur at the earliest possible time. Toussaint
v. McCarthy held that when read together, these regulations create a
liberty interest in freedom from administrative segregation. 801 F.2d
at 1098.

1 being considered, and (3) the prisoner must be allowed to present
2 his views. Toussaint, 801 F.2d at 1100. Due process does not
3 require detailed written notice of charges, representation by
4 counsel or counsel-substitute, an opportunity to present witnesses,
5 a written decision describing the reasons for placing the prisoner
6 in administrative segregation or disclosure of the identity of any
7 person providing information leading to the prisoner's placement in
8 administrative segregation. Id. at 1100-01; accord Wilkinson, 545
9 U.S. at 228-29 (determining that prisoners are constitutionally
10 entitled only to the informal, non-adversary procedures set forth
11 in Greenholtz v. Inmates of Neb. Penal and Correctional Complex,
12 442 U.S. 1 (1979), and Hewitt v. Helms, 459 U.S. 460 (1983), prior
13 to assignment to "supermax" facility).

14 Following placement in administrative segregation, prison
15 officials must engage in some sort of periodic review of the
16 inmate's confinement. Hewitt, 459 U.S. at 477 n.9; Toussaint, 801
17 F.2d at 1101. Due process is satisfied if the decision to
18 segregate the inmate is reviewed by prison officials every 120
19 days, Toussaint v. McCarthy, 926 F.2d 800, 803 (9th Cir. 1990),
20 cert. denied 502 U.S. 874 (1991), and the review amounts to more
21 than "meaningless gestures," Toussaint v. Rowland, 711 F. Supp.
22 536, 540 n.11 (N.D. Cal. 1989) (citing Toussaint v. McCarthy, 801
23 F.2d at 1102). Violation of procedural due process rights requires
24 only procedural correction and not a reinstatement of the
25 substantive right. Raditch v. United States, 929 F.2d 478, 481
26 (9th Cir. 1991).

27 The Ninth Circuit requires that "some evidence" support a
28 decision to place an inmate in segregation for administrative

1 reasons. Toussaint, 801 F.2d at 1104. This standard applies to
2 placement in a SHU for gang affiliation. Bruce, 351 F.3d at 1287-
3 88. The standard is met if there was some evidence from which the
4 conclusion of the administrative tribunal could be deduced. Id. at
5 1105 (citing Superintendent v Hill, 472 U.S. 445, 455 (1985)).
6 Ascertaining whether the standard is satisfied does not require
7 examination of the entire record, independent assessment of the
8 credibility of witnesses or weighing of the evidence. Id.
9 Instead, the relevant question is whether there is any evidence in
10 the record that could support the conclusion reached. Id.

11 The Ninth Circuit requires that the evidence relied upon by
12 prison disciplinary boards contain "some indicia of reliability,"
13 Cato v. Rushen, 824 F.2d 703, 705 (9th Cir. 1987), but has not
14 directly considered whether a corresponding need for evidentiary
15 reliability exists when prison officials segregate an inmate for
16 administrative reasons. Some district courts have extended the
17 reliability requirement to the administrative context, however,
18 holding that "the evidence relied upon to confine an inmate to the
19 SHU for gang affiliation must have 'some indicia of reliability' to
20 satisfy due process requirements." Madrid v. Gomez, 889 F. Supp.
21 1146, 1273-74 (N.D. Cal. 1995); see Jones v. Gomez, 1993 WL 341282,
22 *3-4 (N.D. Cal.) (due process requires indicia of reliability due
23 to high risk of false information by informants, inherent prisoner
24 conflicts and necessity for independent fact-finding by prison
25 officials). Adequate indicia of reliability are (1) the oath of
26 the investigating officer as to the truth of his report that
27 contains confidential information; (2) corroborating testimony;
28 (3) a statement by the chairman of the committee that he had first-

1 hand knowledge of sources of information and considered them
2 reliable based on the informant's past record; and (4) an in camera
3 review of the documentation from which credibility was assessed.
4 Zimmerlee v. Keeney, 831 F.2d 183, 186-87 (9th Cir. 1987).

5 B. California's Regulations for Placement in the SHU

6 CCR § 3378 sets forth the procedures followed to validate
7 inmates as active members or associates of prison gangs.
8 Validation requires three independent source items of documentation
9 indicative of actual membership. CCR §§ 3378(c)(3) and (4). Prior
10 to the submission of a validation package, an inmate is given an
11 opportunity to challenge, in an interview with the IGI, the items
12 used in the validation. CCR § 2278(c)(6)(A). Inmates are to be
13 given written notice at least twenty-four hours in advance of the
14 interview. CCR § 2278(c)(6)(B). All non-confidential source items
15 shall be disclosed to the inmate at the time of notification and
16 any confidential information is disclosed generally. CCR
17 § 2278(c)(6)(C). A validated gang member or associate is deemed to
18 be a severe threat to the safety of others or the security of the
19 institution and will be placed in the SHU for an indeterminate
20 term. CCR § 3341.5(c)(2)(A)2. An inmate assigned to the SHU on an
21 indeterminate basis shall be reviewed by a classification committee
22 at least every 180 days for consideration of release to the general
23 population. CCR § 3341.5(c)(2)(A)1. As part of the review, the
24 IGI reviews evidence previously relied upon to ensure that it was
25 reviewed by the OCS and is reliable. Beeson Dec. ¶ 15. If the
26 evidence was reviewed by the OCS and is deemed to be reliable, the
27 ICC keeps the inmate in the SHU. Id.

28 An inmate housed in the SHU as a gang member or associate may

1 be considered for reclassification to inactive status when the
2 inmate has not been identified as having been involved in gang
3 activity for a minimum of six years. CCR § 3341.5(c)(5); CCR §
4 3378(e). A full review of the validated inmate's gang status takes
5 place every six years. Beeson Dec. ¶ 16. If the review shows that
6 the most recent evidence of gang activity is more than six years
7 old, the IGI reviews the inmate's C-File for evidence of more
8 recent gang membership. Beeson Dec. ¶ 17. If the C-File contains
9 no evidence of recent activity, the investigation proceeds to other
10 areas that may reveal such evidence such as cell searches,
11 information from other agencies and review of the inmate's newer
12 tattoos. Beeson Dec. ¶ 18.

13 The evidence used for gang validation may be based on self-
14 admission, tattoos and symbols, written material, photographs,
15 staff information, information from other agencies, association,
16 informants, offenses, legal documents, visitors, communications
17 observed by prison employees and debriefing reports. CCR
18 § 3378(c)(8). The evidence must meet the criteria for reliability
19 set forth in the CDCR Department Operations Manual (DOM) §§
20 61020.7-10. Beeson Dec. ¶ 12.

21 Debriefing is the process by which the IGI determines whether
22 an inmate has dropped out of a gang. Beeson Dec. ¶ 24. Its
23 purpose is not to acquire incriminating evidence against the
24 inmate, but to provide the IGI with enough information reasonably
25 to conclude that the inmate has dropped out of the gang. Beeson
26 Dec. ¶¶ 25, 26.

27 C. Statute of Limitations

28 The Court's June 14, 2007 Order Granting in Part Defendants'

1 Motion to Dismiss held that Mr. Ashker's 602 appeals 01-2335 and
2 04-2600 and Mr. Troxell's 602 appeal 88-1657 exhausted their due
3 process claim based on Defendants' AB validation procedures and
4 denied without prejudice Defendants' motion to dismiss on statute
5 of limitations grounds. The Court's December 26, 2007 Order
6 Denying Plaintiffs' Motions for Leave to File A Second Amended
7 Complaint noted that Defendants conceded that Mr. Ashker's due
8 process claim based on his 2001 and 2004 appeals were timely, but
9 that they argued that Mr. Troxell's claim, which was exhausted in
10 appeal 88-1657, was barred because it was based on events that
11 occurred prior to August 11, 2001, the date the applicable statute
12 of limitations expired. The Court ruled that the continuing
13 violation theory premised on a systematic policy or practice of
14 discrimination might apply and denied Defendants' motion to dismiss
15 Mr. Troxell's claim on statute of limitations grounds without
16 prejudice to refiling it with their motion for summary judgment.⁹

17 Defendants now argue that Mr. Troxell's AB validation claim is
18 barred by the statute of limitations because it does not meet the
19 requirements of a continuing violation as set forth in Knox v.
20 Davis, 260 F.3d 1009 (9th Cir. 2001). In Knox, the court explained
21 that because the plaintiff did not allege a system or practice of
22 discrimination, the only way he could show a continuing violation
23

24 ⁹A plaintiff who claims a policy and practice of systematic
25 discrimination, as opposed to alleging only individual
26 discriminatory acts, may, in certain circumstances, utilize the
27 continuing violations doctrine. Gutowski v. County of Placer, 108
28 F.3d 256, 259 (9th Cir. 1997). Under this approach, an action is
always timely if brought by a plaintiff currently subject to the
policy, because such policy continually deters the plaintiff from
seeking full rights or threatens to adversely affect the plaintiff
in the future. Id.

1 was to "state facts sufficient to support a determination that the
2 alleged discriminatory acts are related closely enough to
3 constitute a continuing violation, and that one or more of the acts
4 falls within the limitations period." Id. at 1013. The court also
5 differentiated between the continuing impact of a past violation,
6 which does not affect the statute of limitations, and a continuing
7 violation. Id. at 1014. The former occurs when the defendants'
8 previous decision causes them to take subsequent action based upon
9 that decision. Id. Because the first decision puts the plaintiff
10 on notice of the future wrongful acts, the statute of limitations
11 is deemed to have commenced at the time of the first decision. Id.

12 Plaintiffs argue that Defendants have arbitrarily applied the
13 applicable California regulations as a pretext for keeping them in
14 the SHU until they become informants. Plaintiffs have made an
15 insufficient showing to establish a pattern or practice of
16 discrimination; thus, Plaintiffs must show that the alleged
17 discriminatory acts are related closely enough to constitute a
18 continuing violation and that one or more of the acts fell within
19 the limitations period. Defendants argue that the acts of which
20 Mr. Troxell complains are continuing effects of previous actions,
21 not the independent actions required to prove a continuing
22 violation.

23 Mr. Troxell was first validated as a member of the AB gang in
24 1985; he was re-validated in 1995 and 2003. From 1985 to 1995, the
25 interim decisions to retain Mr. Troxell in the SHU were related to
26 the 1985 validation. Between 1995 and 2003, the interim decisions
27 to retain Mr. Troxell in the SHU were related to the 1995 re-
28 validation decision.

1 The Court finds that the interim decisions through 1995 are
2 continuing effects of the 1985 validation and the 1995 re-
3 validation is too far removed in time to be considered a continuing
4 violation of the 1985 validation. Because Mr. Troxell has only
5 exhausted his administrative remedies with respect to the 1985
6 validation, his claim is barred by the statute of limitations.

7 D. Ashker's Due Process Claim

8 Mr. Ashker claims his procedural due process rights were
9 violated because he was not given an adequate opportunity to
10 challenge his 2001 inactive review and his 2002 and 2003 re-
11 validations as a gang member. However, Mr. Ashker does not argue
12 that he did not receive the required notice and opportunity to
13 participate in the hearings at issue. Mr. Ashker states that he
14 did not participate in the 180-day reviews of his status "because
15 such 'reviews' are meaningless [shams], due to the fact these
16 committees have absolutely no authority at all to do anything about
17 my SHU status unless I had previously debriefed" or had been
18 recommended for inactive status. Ashker Dec. ¶ 93. His refusal to
19 participate in the process does not constitute a due process
20 violation by Defendants.

21 Although Mr. Ashker concedes he was provided with a summary of
22 the confidential information used to validate him as a gang member,
23 he argues he was entitled to the confidential information itself.
24 However, due process does not require prison officials to release
25 confidential information if disclosure would compromise
26 institutional security. Toussaint, 801 F.2d at 1101. As indicated
27 by Defendants, disclosure of the confidential information to Mr.
28 Ashker would compromise ongoing investigations of prison gang

1 activity and would allow Mr. Ashker to disseminate the confidential
2 information which would threaten the safety and security of the
3 confidential informants.

4 Mr. Ashker argues that the fact that he has never been issued
5 a CDC-115 Rule Violation Report (RVR) establishes that he is not a
6 member of a gang. His theory is that the definition of gang
7 activity includes the commission of felonious acts for which an RVR
8 must be issued. This argument is frivolous.

9 Mr. Ashker also contends that the regulations are enforced
10 arbitrarily because there are many gang members in the general
11 population. However, the evidence submitted for this contention is
12 inadmissible newspaper and magazine articles. Furthermore, this
13 evidence does not support his claim that Defendants improperly
14 reviewed him for gang validation.

15 Mr. Ashker also claims that the debriefing process is a sham
16 because it forces inmates who are not gang members and who want to
17 be released from the SHU to lie about gang involvement. He states
18 that he would not debrief because it would put his life at risk
19 from retaliation by other inmates. Thus, he argues, once an inmate
20 is placed in the SHU because of gang membership, he can never get
21 out of the SHU. However, the regulations provide that an inmate
22 may be placed on inactive status and released from the SHU if there
23 is no new evidence of gang activity for six years. Furthermore, as
24 discussed above, the regulations contain adequate due process
25 considerations for the determination that an inmate is a gang
26 member.

27 Mr. Ashker argues that the evidence used for his inactive
28 review and the resulting re-validation as a gang member was based

1 on innocuous associational activity and unsubstantiated allegations
2 of confidential informants.

3 Defendants have submitted, for in camera review, eight
4 confidential memos which the IGI relied upon to conclude that Mr.
5 Ashker was still a member of the AB prison gang. These documents
6 were in Mr. Ashker's Central File in August, 2001 and reviewed by
7 the IGI for the purpose of determining whether to re-validate him
8 as a gang member. See Kenny Dec., Ex. 1 August 2, 2001 Memo from
9 Lt. G.H. Wise, IGI Investigator. The Court has reviewed these
10 memos and finds that they constitute more than the required some
11 evidence that Mr. Ashker is a member of the AB gang and that they
12 contain adequate indicia of reliability.

13 Mr. Ashker's main argument regarding the evidence is that it
14 must be false because he was not issued a serious rule violation.
15 However, as discussed above, to be validated as a member of a gang,
16 all that is needed is evidence of active gang activity such as that
17 contained in the confidential memos discussed above. Furthermore,
18 Mr. Ashker's attestations that he has never been a member of the AB
19 gang raises a dispute of fact regarding whether he was in a gang,
20 but not whether there is some evidence to validate him as a gang
21 member.

22 Therefore, Mr. Ashker's due process claim regarding gang
23 validation fails. Summary judgment on this claim is granted in
24 favor of Defendants and Plaintiffs' cross-motion is denied.

25 IV. Inability to Participate in Certain Programs

26 Plaintiffs contend that their due process and equal protection
27 rights were violated in that they were unable to participate in
28 certain programs because they are housed in the SHU.

1 The hardship associated with administrative segregation, such
2 as loss of recreational and rehabilitative programs or confinement
3 to one's cell for a lengthy period of time, is not so severe as to
4 violate the Due Process Clause itself. Toussaint, 801 F.2d at
5 1091-92; Moody v. Daggett, 429 U.S. 78, 88 n.9 (1976) (no due
6 process right to institutional programs); Hoptowit v. Ray, 682 F.2d
7 1237, 1254-55 (9th Cir. 1982) (no constitutional right to
8 rehabilitation). CCR § 3040 provides that inmates shall be
9 assigned to programs taking into account the inmate's eligibility
10 for the program, the institution's security and operational needs,
11 and the safety of the inmate, staff and the general public. CCR
12 § 3343(k) provides that inmates housed in the SHU are permitted to
13 participate in programs that can be reasonably provided without
14 endangering security or safety.

15 Citing the declarations of twenty-four inmates, Mr. Ashker
16 disputes the claim that SHU inmates are violent. Most of the
17 declarants state that they have never been charged with committing
18 an illegal or violent act. However, these self-serving statements
19 do not raise an issue of material fact with regard to the violence
20 potential of SHU inmates.

21 Defendants submit the declaration of Mark Castellaw, who
22 worked as a correctional training officer at PBSP from 1989 to
23 June, 2006 and who is familiar with the programs offered at PBSP
24 and those offered to inmates in the SHU. Castellaw Dec. ¶¶ 1, 5.
25 Mr. Castellaw states that because the SHU is the highest security
26 level at PBSP, many programs available to the general population,
27 particularly those that entail interacting with others or taking
28 classes in a group situation, are not available to inmates in the

1 SHU. Id. at ¶¶ 7, 9-13. However, in the last five years, high
2 school classes leading to a general equivalency diploma (GED) and
3 college correspondence courses have been available to SHU inmates.
4 Id. at ¶ 9. Also, the Corrections Learning Network, which provides
5 educational and work-based training via television, is available
6 for SHU inmates. Id. Mr. Castellaw states that, based on his
7 experience working in the SHU, he believes the programs available
8 to SHU inmates are appropriate given their propensity for violence
9 and the necessity to ensure the safety of PBSP staff, inmates and
10 the public. Id. at ¶ 14.

11 Mr. Ashker admits that, beginning in 1999, SHU inmates were
12 given GED assistance and that Correctional Learning Videos and
13 college courses are now available to SHU inmates. Still, he argues
14 that the number of openings in some programs is limited due to lack
15 of financial resources.

16 Because there is no liberty interest in rehabilitative
17 programs, Mr. Ashker's complaint of limited access to programs
18 fails to state a claim for a constitutional violation.

19 Mr. Ashker also argues that, because participating in programs
20 is one of the factors considered in parole eligibility, lack of
21 access to such programs violates his due process rights in being
22 granted parole. However, any connection between SHU conditions and
23 Mr. Ashker's desire to be granted parole is too attenuated to
24 support a federal due process claim. See Sandin v. Conner, 515
25 U.S. 472, 487 (1995) (claim that misconduct will affect parole
26 decision too attenuated to invoke due process protections);
27 Dorrough v. On Habeas Corpus, 2008 WL 4532516, *3 (E.D. Cal.) (any
28 connection between SHU lack of programming and decision regarding

1 sentence commutation too attenuated to support due process claim).

2 Mr. Ashker also argues that his equal protection rights are
3 violated because inmates in the general population at PBSP and
4 high-security prisoners in other institutions are allowed access to
5 more programs than PBSP SHU inmates.

6 "The Equal Protection Clause of the Fourteenth Amendment
7 commands that no State shall 'deny to any person within its
8 jurisdiction the equal protection of the laws,' which is
9 essentially a direction that all persons similarly situated should
10 be treated alike." City of Cleburne v. Cleburne Living Center, 473
11 U.S. 432, 439 (1985). Because there is no fundamental right to
12 prison programs, and because Plaintiffs are not in a suspect class,
13 the Equal Protection claim is reviewed under a rational basis
14 standard. More v. Farrier, 984 F.2d 269, 271 (8th Cir. 1993).
15 Under this standard, plaintiffs must show that they are similarly
16 situated with persons who are treated differently and that there is
17 no rational basis for the dissimilar treatment. Id. Plaintiffs
18 must also show that defendants acted with an intent or purpose to
19 discriminate against them based upon their membership in a
20 protected class. Serrano v. Francis, 345 F.3d 1071, 1082 (9th Cir.
21 2003).

22 Here, the regulations in question and the restrictions on SHU
23 inmates' access to programs are rationally related to the
24 legitimate penological interest of maintaining security in the
25 institution. Plaintiffs' Equal Protection claim fails for this
26 reason alone. Furthermore, inmates housed in the SHU are not
27 similarly situated with prisoners in the general population because
28 of the higher security risk presented by those placed in the SHU.

1 Inmates in the PBSP SHU do not constitute a suspect class vis a vis
2 inmates in other high-security institutions.

3 Even if there was a constitutional violation, Defendants would
4 be entitled to qualified immunity because there is no clearly
5 established law that limiting program access of SHU inmates
6 violated a constitutional right.

7 Accordingly, summary judgment is granted in favor of
8 Defendants on the due process and equal protection claims based on
9 lack of access to programs.

10 V. Ashker's Due Process Claims Regarding Parole Determination

11 Mr. Ashker brings due process claims for injunctive relief
12 against the Board based on its finding him ineligible for parole on
13 its alleged unwritten policy to predetermine the outcome of parole
14 eligibility hearings for SHU inmates by requiring them to meet
15 goals that are unavailable to those housed in the SHU.

16 A. Legal Standard

17 The Supreme Court has established that a parole board's
18 decision deprives a prisoner of due process with respect to his
19 constitutionally protected liberty interest in a parole release
20 date if the board's decision is not supported by "some evidence in
21 the record," or is "otherwise arbitrary." Sass v. California Bd.
22 of Prison Terms, 461 F.3d 1123, 1128 (9th Cir. 2006) (citing
23 Superintendent v. Hill, 472 U.S. 445, 457 (1985)). An examination
24 of the entire record is not required nor is an independent weighing
25 of the evidence. Hill, 472 U.S. at 455. The relevant question is
26 whether there is any evidence in the record that could support the
27 conclusion reached by the administrative board. Id.

28 When assessing whether a state parole board's unsuitability

1 determination was supported by "some evidence," the court's
2 analysis is framed by the statutes and regulations governing parole
3 suitability determinations in the relevant state. Sass, 461 F.3d
4 at 1128. Accordingly, in California, the court must look to
5 California law to determine the findings that are necessary to deem
6 a prisoner unsuitable for parole, and then must review the record
7 to determine whether the state court decision constituted an
8 unreasonable application of the "some evidence" principle. Id.

9 California law provides that a parole date is to be granted
10 unless it is determined "that the gravity of the current convicted
11 offense or offenses, or the timing and gravity of current or past
12 convicted offense or offenses, is such that consideration of the
13 public safety requires a more lengthy period of incarceration
14" Cal. Penal Code § 3041(b).

15 The California Code of Regulations sets out the factors
16 showing suitability or unsuitability for parole that the parole
17 authority is required to consider. CCR § 2402(b). These include
18 "[a]ll relevant, reliable information available," such as:

19 the circumstances of the prisoner's social history; past
20 and present mental state; past criminal history,
21 including involvement in other criminal misconduct which
22 is reliably documented; the base and other commitment
23 offenses, including behavior before, during and after the
24 crime; past and present attitude toward the crime; any
25 conditions of treatment or control, including the use of
26 special conditions under which the prisoner may safely be
27 released to the community; and any other information
28 which bears on the prisoner's suitability for release.
Circumstances which taken alone may not firmly establish
unsuitability for parole may contribute to a pattern
which results in a finding of unsuitability.

26 Id.

27 Circumstances tending to show unsuitability for parole
28 include the nature of the commitment offense and whether "[t]he

1 prisoner committed the offense in an especially heinous, atrocious
2 or cruel manner." CCR § 2402(c). This includes consideration of
3 the number of victims, whether "[t]he offense was carried out in a
4 dispassionate and calculated manner," whether the victim was
5 "abused, defiled or mutilated during or after the offense,"
6 whether "[t]he offense was carried out in a manner which
7 demonstrates an exceptionally callous disregard for human
8 suffering," and whether "[t]he motive for the crime is
9 inexplicable or very trivial in relation to the offense." Id.

10 Other circumstances tending to show unsuitability for parole
11 are a previous record of violence, an unstable social history,
12 previous sadistic sexual offenses, a history of severe mental
13 health problems related to the offense, and serious misconduct in
14 prison or jail. Id.

15 Circumstances tending to support a finding of suitability for
16 parole include no juvenile record, a stable social history, signs
17 of remorse, that the crime was committed as a result of
18 significant stress in the prisoner's life, a lack of criminal
19 history, a reduced possibility of recidivism due to the prisoner's
20 present age, that the prisoner has made realistic plans for
21 release or has developed marketable skills that can be put to use
22 upon release, and that the prisoner's institutional activities
23 indicate an enhanced ability to function within the law upon
24 release. CCR § 2402(d).

1 B. Claimed Due Process Violation

2 At the August 7, 2003 Board hearing at issue here,¹⁰ the Board
3 reviewed Mr. Ashker's record at length and noted that he was first
4 arrested at thirteen years of age and, after committing many
5 crimes, was sentenced to six years in prison for assault with a
6 deadly weapon, infliction of great bodily injury and burglary. In
7 1987, while serving this sentence, he murdered inmate Dennis
8 Murphy. Jud. Not., Ex. 12 at 14-17. Although disputed by Mr.
9 Ashker, the record shows that the murder was part of an AB gang
10 "hit." Id. at 28. Mr. Ashker engaged in negative behavior while
11 in prison by assaulting PBSP employees and inmates and he has been
12 validated and re-validated as an AB gang member. Id. at 22-23.
13 Additionally, the Board noted that Mr. Ashker had refused to
14 participate in psychiatric evaluations, did not have any parole
15 plans, had no work record, and had no letters of support from
16 family members. The district attorney and Mr. Ashker's PBSP
17 counselor opposed parole based on Mr. Ashker's extremely high
18 degree of threat to the public if released. Id. at 28-32.

19 For all these reasons, the Board found that Mr. Ashker would
20 be a danger to the public if released on parole. Id. at 31-32.
21 These reasons constitute more than the "some evidence" that is
22 required for the Board to find an inmate a danger to the public if
23 released.

24 Mr. Ashker complains that the Board recommended that he
25 participate in self-help classes and upgrade vocationally, knowing
26

27 ¹⁰Mr. Ashker submits evidence of a 2008 parole hearing.
28 However, this hearing is not before the Court and, thus, it cannot
be considered.

1 that such programs are not available to him because he is housed in
2 the SHU. However, this argument, even if true, would not negate
3 the fact that the Board's findings constituted the required quantum
4 of evidence for finding Mr. Ashker a danger to the public if he
5 were to be released. Therefore, the Board did not violate Mr.
6 Ashker's due process rights by finding him unsuitable for parole.

7 C. No Parole Policy

8 Mr. Ashker argues that the Board has a no parole policy for
9 SHU inmates because it requires them to participate in work, self-
10 help and education programs which are not available to them.

11 As stated previously, CCR § 2402(b) specifies that many
12 factors are to be weighed by the Board in determining whether an
13 inmate is eligible for parole and that all relevant, reliable
14 information available to the Board shall be considered in
15 determining eligibility for parole.

16 Under CCR § 2402(b), the Board may consider an inmate's
17 participation in self-help, educational and work programs to
18 evaluate his suitability for parole. Mr. Ashker does not argue
19 that this criteria is not relevant to parole suitability
20 determinations. Rather, he complains that he is at a disadvantage
21 because, as an inmate in the SHU, he cannot participate in these
22 programs. However, as discussed above, there is no constitutional
23 right to access to programs in prison.

24 Mr. Ashker claims that the Board "knows" that the only way out
25 of the SHU is debriefing, which he refuses to consider because it
26 would mark him as an informant and place him and his family at
27 risk. However, as the Court has previously found, Mr. Ashker's
28 constitutional rights were not violated by his placement in the SHU

1 as a validated gang member. Mr. Ashker's own actions have
2 warranted his placement in the SHU and it is his own decision not
3 to undertake the available methods for release from the SHU.

4 The state superior court case cited by Mr. Ashker, In re
5 Criscione, 71614 (Santa Clara County Superior Court, August 30,
6 2007) (addressing a constitutional vagueness challenge to the
7 regulation allowing the Board to deny parole where the commitment
8 offense was especially heinous, atrocious or cruel), is not
9 applicable to Mr. Ashker's claim.

10 For all these reasons, the Board's policy of evaluating SHU
11 inmates' participation in educational, self-help and vocational
12 programs in determining their suitability for parole does not
13 violate Mr. Ashker's due process rights. Summary judgment on this
14 claim is granted in favor of Defendants.

15 VI. State Law Claims

16 Plaintiffs bring claims of negligence and negligence per se
17 against Defendants for violating CCR §§ 3040 and 3343(k) in failing
18 to provide programs for Plaintiffs, for creating a no-parole policy
19 followed by the Board, and for using Plaintiffs' gang status
20 against them by housing them in the SHU where they have no access
21 to programs unless they debrief. Also, Plaintiffs bring a tort
22 claim against Defendants for intentionally depriving Plaintiffs' of
23 their parole rights.

24 Defendants argue that the state claims are barred by the
25 applicable statute of limitations.

26 The Tort Claims Act, California Government Code §§ 810 et al.,
27 provides that claims for money damages against the State of
28 California must first be presented to and rejected by the

1 California Victim Compensation and Government Claims Board (Claims
2 Board). Cal. Gov't Code §§ 905.2, 925; Richards v. Dep't of
3 Alcoholic Beverages, 139 Cal. App. 4th 304, 317 (2006). A law suit
4 must be filed within six months after the Claims Board rejects a
5 claim. Cal. Gov't Code § 945.6(a)(1). This section applies to
6 persons incarcerated in state prison. Cal. Gov't Code § 945.6(c).

7 The parties agree that Plaintiffs' state claims were rejected
8 by the Claims Board on October 7, 2004 and November 4, 2004 and
9 that the initial complaint in this case was filed on August 16,
10 2005. Therefore, under California Government Code § 945.6(a)(1),
11 Plaintiffs' state claims are untimely.

12 Nevertheless, Plaintiffs argue that their claims are timely
13 because they are entitled to the two-year tolling period provided
14 for prisoners in California Civil Procedure § 352.1(a). However,
15 as correctly pointed out by Defendants, § 352.1(b) provides that
16 the tolling provision is not applicable to any action against a
17 public entity or public employee for which a claim is required to
18 be presented in accordance with the Tort Claims Act. Therefore,
19 the two-year tolling period under § 352.1(a) does not apply to
20 Plaintiffs' state claims.

21 Plaintiffs also argue that the statute of limitations on their
22 claims should be equitably tolled. State claims are subject to the
23 forum state's statute of limitations and tolling laws. Hardin v.
24 Straub, 490 U.S. 536, 539 (1989); Cervantes v. City of San Diego, 5
25 F.3d 1273, 1275 (9th Cir. 1993). Under California law, equitable
26 tolling "relieves a plaintiff from the bar of a limitations statute
27 when, possessing several legal remedies, he, reasonably and in good
28 faith, pursues one designed to lessen the extent of his injuries or

1 damage." Addison v. California, 21 Cal. 3d 313, 317 (1978). A
2 plaintiff's pursuit of a remedy in another forum equitably tolls
3 the limitations period if the plaintiff's actions satisfy three
4 factors: (1) timely notice to the defendants in filing the first
5 claim; (2) lack of prejudice to the defendants in gathering
6 evidence for the second claim; and (3) good faith and reasonable
7 conduct in filing the second claim. Collier v. City of Pasadena,
8 142 Cal. App. 3d 917, 924 (1983); Hull v. Central Pathology Serv.
9 Med. Clinic, 28 Cal. App. 4th 1328, 1335 (1994). In Wood v. Elling
10 Corp., 20 Cal. 3d 353, 361-62 (1977), the California Supreme Court
11 listed the three elements necessary for the application of
12 equitable tolling as: (1) the plaintiff must have diligently
13 pursued his or her claim; (2) the plaintiff's lack of a judicial
14 forum for resolution of the claim must be attributable to forces
15 outside the plaintiff's control; and (3) the defendant must not be
16 prejudiced by application of equitable tolling.

17 Here, Plaintiffs did not pursue a remedy in another forum nor
18 do they indicate the reason for their delay in filing their
19 lawsuit. Moreover, their lack of a judicial forum for their claims
20 is not attributable to forces outside of their control. Equitable
21 tolling does not apply under these circumstances.

22 Furthermore, even if equitable tolling applied, the claims
23 would be denied on their merits. As Defendants correctly point
24 out, they are statutorily immune from liability on these claims.
25 See Cal. Gov't Code § 820.2 ("except as provided by statute, a
26 public employee is not liable for an injury resulting from his act
27 or omission where the act or omission was the result of the
28 exercise of the discretion vested in him, whether or not such

1 discretion be abused"); Cal. Gov't Code § 845.8 (public entities
2 and public employees immune from liability for injury resulting
3 from determining whether to parole or release prisoner); Leyva v.
4 Nielsen, 83 Cal. App. 4h 1061, 1067 (2000) (parole determination
5 process is discretionary; thus, Board commissioners immune from
6 suit for parole decisions under §§ 820.2 and 845.8); Cal. Gov't
7 Code § 845.2 (public entities and public employees immune from suit
8 for failure to provide prison programs); Estate of Abdollahi v.
9 County of Sacramento, 405 F. Supp. 2d 1194, 1214 (E.D. Cal. 2005)
10 (failure to provide prison program discretionary policy decision
11 immune from suit under § 820.2).

12 Therefore, summary judgment is granted in favor of Defendants
13 on the state law claims.

14 VII. Plaintiffs' Motion for Preliminary Injunction

15 Plaintiffs seek a preliminary injunction in the event they are
16 not granted summary judgment on their claims.

17 "The function of a preliminary injunction is to maintain the
18 status quo ante litem pending determination of the action on the
19 merits." Washington Capitols Basketball Club, Inc. v. Barry, 419
20 F.2d 472, 476 (9th Cir. 1969). The moving party is entitled to a
21 preliminary injunction if it establishes either: (1) a combination
22 of probable success on the merits and the possibility of
23 irreparable harm, or (2) that serious questions regarding the
24 merits exist and the balance of hardships tips sharply in the
25 moving party's favor. Clear Channel Outdoor, Inc. v. City of Los
26 Angeles, 340 F.3d 810, 813 (9th Cir. 2003); Rodeo Collection, Ltd.
27 v. West Seventh, 812 F.2d 1215, 1217 (9th Cir. 1987). The test is
28 a "continuum in which the required showing of harm varies inversely

1 with the required showing of meritoriousness." Id.

2 Because summary judgment has been entered against Plaintiffs
3 on all their claims except the claim for prospective injunctive
4 relief for late delivery of mail, there is no likelihood of their
5 success on the merits on these claims. Furthermore, Plaintiffs
6 have not met their burden of showing that a preliminary injunction
7 is warranted on the claim for late delivery of mail. Therefore,
8 Plaintiffs' motion for a preliminary injunction is denied.

9 CONCLUSION

10 Based upon the foregoing, Defendants' motion for summary
11 judgment is granted as to all claims with the exception of the
12 claim for prospective injunctive relief for late delivery of
13 incoming mail, against Warden Francisco Jacquez, acting in his
14 official capacity. Plaintiffs' cross-motion for summary judgment
15 and motion for preliminary injunction are denied.

16 Because Plaintiff's only remaining claim is for injunctive
17 relief, it must be adjudicated in a trial to the Court. Danjaq LLC
18 v. Sony Corp., 263 F.3d 942, 962 (9th Cir. 2001) (Seventh Amendment
19 preserves right to jury for all legal claims, but no such right for
20 equitable claims). The first question for trial will be how
21 pervasive and lengthy are the delays in incoming mail at times
22 other than holidays, compared to the volume of mail that is
23 delivered timely. Delays in first class mail will be considered
24 more important than delays in other types of mail. The second
25 question is whether Defendant Jacquez could utilize different
26 methods for processing incoming inmate mail that would not cause
27 such delay. Most of the evidence on these points will be
28 documentary and not subject to determinations of credibility.

1 Accordingly, each side's case in chief will be presented by
2 declarations of witnesses with personal knowledge of the facts,
3 attaching evidence of mail either timely or untimely delivered.
4 Plaintiffs' evidence of the seventeen pieces of mail discussed in
5 this order will be considered. Additional evidence as to whether
6 this represents first class mail would be considered. Plaintiffs'
7 evidence of fourteen envelopes postmarked after August 11, 2005,
8 when the complaint in this case was filed, cannot be grounds for
9 relief but will be considered as evidence of the continuing nature
10 of the problem. Plaintiffs are advised to submit these envelopes,
11 and any other documentary evidence, as attachments to a declaration
12 from an individual who can testify, from his or her personal
13 knowledge, as to the authenticity of the documents. Plaintiffs
14 shall submit any additional trial declarations, and documentary
15 evidence authenticated by declarations, sixty days from the date of
16 this order. Sixty days thereafter, Defendant Jacquez shall submit
17 any countering declarations and documentary evidence, demonstrating
18 that mail is most often delivered timely or that there are no other
19 mail procedures available that would result in more timely delivery
20 or both. Defendant shall also file a trial brief indicating
21 whether he believes that cross-examination of Plaintiffs or of any
22 of their declarants is needed and, if so, why, and how that should
23 be accomplished. Defendant may also include in this brief his
24 objections to any of Plaintiffs' trial evidence. Thirty days after
25 Defendant's submission, Plaintiffs may submit a trial brief stating
26 whether and, if so, why they believe that cross-examination of any
27 of Defendant's declarants is needed, and any objections to
28 Defendant's evidence. They may also submit additional declarations

1 and authenticated documentary evidence rebutting Defendant's
2 evidence. Thereafter, the Court will either arrange for cross-
3 examination or issue its decision.

4 IT IS SO ORDERED.

5
6 Dated: 3/25/09



CLAUDIA WILKEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

ASHKER ET AL et al,

Case Number: CV05-03286 CW

Plaintiff,

CERTIFICATE OF SERVICE

v.

SCHWARZENEGGER ET AL et al,

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 25, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Danny Troxell B-76578
Pelican Bay State Prison
P.O. Box 7500, C-8-101
Crescent City, CA 95531

Todd Ashker C-58191
Pelican Bay State Prison
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Dated: March 25, 2009

Richard W. Wieking, Clerk
By: Sheilah Cahill, Deputy Clerk